JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

Public Prosecutor v Thurairaj a/l Arulnathan

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–114 OF 2005
NALLINI PATHMANATHAN JC
8 JUNE 2009

Criminal Law — Murder — s 302 read together with s 149 of the Penal Code — Unlawful assembly in furtherance of common object — Ingredients — Whether proved — Whether accused member of unlawful assembly — Whether 'mens rea' or intention established — Whether defence raised reasonable doubt in prosecution's case — Whether defence devoid of merits — Whether prima facie case established

Criminal Procedure — Trial — Close of prosecution case — Criminal Procedure Code s 180 — Prima facie case — Whether established — Maximum evaluation of evidence — Meticulous examination of evidence

Evidence — Witness — Credibility — SP4 was only witness who identified accused — Whether there was plausible ground to reject witness's evidence — Whether there was sufficient corroboration from other witnesses — Whether absence of material witness affected substantially core of case against accused — Whether adverse inference could be drawn against prosecution

SP1, a worker at the Pam Tangki Air, in Lipat Kajang had, on 13 December 2003, found a partially burnt corpse of an adult male not far from the water tank/reservoir, at the edge of a road. He then lodged a police report and an investigation ensued therefrom. Some two years after the event, in 2005, the accused was charged together with several other persons who remain at large, for an offence under s 149 punishable under s 302 of the Penal Code ('Code') for having caused, together with other members of the unlawful assembly, the death of the deceased. SP11 (the pathologist) who conducted the post-mortem, stated that the body of the deceased ('victim')was partially burnt and there were also no less than fifteen to sixteen slash wounds sustained by the victim over all parts of his body. The pathologist concluded that the cause of death was slash wounds to the head, neck and right limb. The accused's version of events was that he was in the area at the time when a group of men were seen brandishing '*parangs*', but at the same time, he maintained that he was seated in a vehicle far away from the incident and that he left upon seeing the group of men with their knives.

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

Held, sentencing the accused to nine years' imprisonment:

(1) The evidence of SP4 and SP5 taken together showed that a group of five to seven men emerged from a silver Kancil car, shouting foul words in the Tamil language, while brandishing large sickle-like '*parangs*' or knives. They then proceeded to attack SP4, SP5 and the victim. SP4 clearly identified the accused as a member of this assembly (see para 41).

(2) The cumulative effect of the evidence of SP4 considered in conjunction with that of SP11, and the fact that the victim's body was found partially burnt near the water tank in Lipat Kajang gave rise to the irresistible inference and conclusion that the unlawful assembly of men wielding '*parangs*', who had attacked SP4, SP5 and the victim were responsible for his death arising from the multiple slash wounds to his person. There does not appear to be any other reasonable or possible explanation of these facts (see para 51).

(3) On the totality of the evidence adduced, it was established that the accused or the members of the unlawful assembly intended to kill the victim. It was true that numerous wounds were inflicted on him. However, they were largely slash wounds on his limbs, not such as to cause instantaneous death. There was insufficient evidence from which the court could infer that the unlawful assembly of which the accused was a member, intended to cause death, or to cause such bodily injury as is sufficient to cause death. The pathologist did not state in the course of his evidence that the bodily injury inflicted was sufficient in the ordinary course of nature to cause death (see para 58).

(4) The court could not find the evidence of 'mens rea' or 'intention' as prescribed in the remaining three limbs of s 300 of the Code. As all the ingredients necessary to prove a prima facie case against the accused were fulfilled, save for the final 'mens rea' ingredient, the court concluded at the close of the prosecution case that the charge be amended to one under s 304(a) of the Code (see para 58).

(5) The accused's version of events was a mere denial that he was a part of the unlawful assembly, yet he was present in the area that night and saw an unlawful assembly on the same street. It would have been expected if indeed his version of events was bona fide, that this version of events would have been put to the prosecution witnesses from the outset. Taken as a whole, the lack of continuity and nexus in the accused's version of events, coupled with the failure to put the defence version of events to the prosecution witnesses, suggested that the defence had been tailored to meet the prosecution's version of events (see para 80).

[Bahasa Malaysia summary

SP1, pekerja Pam Tangki Air, di Lipat Kajang telah, pada 13 Disember 2003,

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

menjumpai mayat seorang lelaki dewasa yang sebahagiannya rentung tidak jauh daripada pam air/takungan, di tepi jalan. Dia kemudiannya membuat laporan polis dan satu siasatan dijalankan. Dua tahun selepas kejadian tersebut, pada 2005, tertuduh telah dituduh bersama dengan beberapa orang lain yang tidak dapat dikesan, untuk kesalahan di bawah s 149 dihukum di bawah s 302 Kanun Keseksaan ('Kanun') kerana menyebabkan, bersama dengan anggota perhimpunan haram, kematian si mati. SP11 (ahli patologi) yang menjalankan autopsi, menyatakan bahawa badan si mati ('mangsa') sebahagiannya rentung dan terdapat tidak kurang daripada lima belas hingga enam belas luka tetakan yang dialami oleh mangsa di kesemua bahagian badannya. Ahli patologi menyimpulkan bahawa sebab kematian ialah luka tetakan di kepala, leher dan anggota kanan. Versi tertuduh mengenai kejadian tersebut ialah bahawa dia berada di kawasan itu pada masa apabila sekumpulan lelaki dilihat mengayunkan parang, tetapi pada masa yang sama, dia mengekalkan bahawa dia berada dalam kenderaan jauh daripada tempat kejadian tersebut dan dia meninggalkan tempat itu selepas melihat sekumpulan lelaki dengan pisau mereka.

Diputuskan, menjatuhkan hukuman penjara sembilan tahun ke atas tertuduh:

(1) Keterangan SP4 dan SP5 yang diambil bersama menunjukkan bahawa sekumpulan lima hingga tujuh orang lelaki muncul daripada kereta Kancil berwarna perak, menjerit dalam bahasa kesat dalam bahasa Tamil, sementara mengayunkan sabit besar yang kelihatan seperti parang atau pisau-pisau. Mereka kemudiannya terus menyerang SP4, SP5 dan si mati. SP4 secara jelasnya telah mengenalpasti tertuduh sebagai ahli perhimpunan tersebut (lihat perenggan 41).

(2) Kesan kumulatif keterangan SP4 dipertimbangkan bersama SP11, dan fakta bahawa badan mangsa dijumpai rentung sebahagiannya berdekatan pam air di Lipat Kajang menimbulkan inferens yang tidak dapat dibendung dan kesimpulan bahawa perhimpunan haram sekumpulan lelaki mengacukan parang, yang telah menyerang SP4, SP5 dan mangsa bertanggungjawab terhadap kematiannya yang timbul daripada beberapa luka tetakan ke atasnya. Tidak terdapat sebarang penjelasan lain yang munasabah dan mungkin ke atas fakta-fakta ini (lihat perenggan 51).

(3) Atas keseluruhan keterangan yang dikemukakan, dibuktikan bahawa tertuduh atau anggota-anggota perhimpunan haram bertujuan membunuh mangsa. Benar bahawa dia mengalami banyak luka tetakan. Walau bagaimanapun, kebanyakannya adalah luka ke atas anggotanya, tidak menyebabkan kematian segera. Tidak terdapat keterangan yang mencukupi untuk mahkamah boleh membuat inferens bahawa

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

perhimpunan haram yang dianggotai tertuduh, bertujuan menyebabkan kematian, atau menyebabkan kecederaan anggota badan yang mencukupi untuk menyebabkan kematian. Ahli patologi tidak menyatakan dalam keterangannya bahawa kecederaan anggota badan yang dikenakan mencukupi secara biasa untuk menyebabkan kematian (lihat perenggan 58).

(4) Mahkamah tidak dapat menemui keterangan 'mens rea' atau 'intention' seperti yang dinyatakan dalam tiga bahagian s 300 Kanun yang tinggal. Memandangkan kesemua elemen yang diperlukan untuk membuktikan kes prima facie terhadap tertuduh telah dipenuhi, kecuali elemen terakhir 'mens rea', mahkamah menyimpulkan di akhir kes pendakwaan bahawa tuduhan dipinda kepada yang di bawah s 304(a) Kanun (lihat perenggan 58).

(5) Versi tertuduh mengenai kejadian tersebut hanyalah satu penafian bahawa dia sebahagian daripada perhimpunan haram tersebut, tetapi dia berada di kawasan tersebut pada malam itu dan melihat perhimpunan haram yang sama di jalan yang sama. Sekiranya versi kejadiannya benar-benar bona fide, maka versi kejadian ini akan diambil menjadi saksi-saksi pendakwaan sejak mula lagi. Diambil secara keseluruhannya, kekurangan kesinambungan dan hubungkait dalam versi kejadian tertuduh, ditambah dengan kegagalan untuk meletakkan pembelaan versi kejadian kepada saksi-saksi pendakwaan, mencadangkan bahawa pembelaan tersebut dirancang untuk bersamaan dengan versi kejadian pendakwaan (lihat perenggan 80).]

Notes

For cases on close of prosecution case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

For cases on credibility, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2673–2688.

For cases on murder in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1154–1167.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (folld)

Francis & Ors v PP [1960] MLJ 40; [1959] 1 LNS 28, CA (refd)

Lim Chew Yoong v Reg [1960] MLJ 111; [1960] 1 LNS 61, CCA (folld)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (folld)

Ong Ching Seng & Anor v Reg [1960] MLJ 34, CA (refd)

PP v Abdul Kadar Kadam Ali & Ors [2008] 8 MLJ 349, HC (refd)

R v Turnbull [2001] EWCA Crim 2244, CA (refd)

Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Transport Ministry v Garry [1973] 1 NZLR 120, SC (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

Legislation referred to

Criminal Procedure Code s 180
Evidence Act 1950
Penal Code ss 141, 142, 149, 299, 300, 302, 304(a)

Nordin bin Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Varghese a/l Onny (Rajendran & Deen) for the defendant.

Nallini Pathmanathan JC:

INTRODUCTION

[1] On the 13 December 2003, at around 8am, one Mat Noh bin Solo, SP1 ('SP1') a worker at the Pam Tangki Air, in Lipat Kajang found a partially burnt corpse of an adult male not far from the water tank/reservoir, at the edge of a road. He immediately lodged a police report and investigations ensued. The victim was identified as one Sarawanan a/l Muniandy. Some two years after the event, in 2005, the accused, Thurairaj a/l Arulnathan was charged together with several other persons who remain at large, with being members of an unlawful assembly whose common object was to cause grievous hurt or injury with the use of dangerous weapons to the deceased. It was further charged that in the course of that unlawful assembly, one or more than one of the members of the unlawful assembly, in the prosecution of the common object, committed murder by causing the death of the said Sarawanan, an offence which the members of the assembly knew to be likely to be committed in the prosecution of their common object. As such, Thurairaj is alleged to have committed an offence under s 149 punishable under s 302 of the Penal Code for having caused, together with other members of the unlawful assembly, the death of the said Sarawanan.

SALIENT FACTS

The evidence of S Prakash a/l Sellamuthu SP4 ('CSP4')

[2] On 12 December 2003, at about 2.30pm, SP4 and four of his friends, including the deceased, Sarawanan went out together from Pandamaran where SP4 lived. They utilised three motorcycles between them. They travelled to Klang. In the course of their journey, they passed a narrow road located in a housing area. From the opposite side, a car approached them. As they passed each other, the driver of the car 'rammed' his engine at these motorcyclists. The friends then turned back and rode towards the car. The vehicle stopped and the accused got out of the car. The deceased, Sarawanan then asked him why he had 'rammed' the engine at them. According to SP4, the accused responded by using foul language. When SP4 heard the language

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

used, he slapped the accused. The accused did not respond. This entire incident occurred outside the house of one of both parties' mutual friends, by the name of Dominic. At this point, Dominic appeared and separated them. Dominic explained that the accused was his cousin. SP4 then apologised to the accused, who appeared angry. Sarawanan however asked the accused why he was 'staring and sour-faced'. He then proceeded to ask the accused whether the accused wished to 'slash' him and said, according to SP4, 'If you want to kill me, do so'. He also said 'If I do not die, I shall kill you' or words to that effect. Soon after this, Dominic's mother appeared and explained again that the accused was her nephew. The incident ended there and the five friends continued on their way to Klang. The entire incident took about twenty minutes.

[3] Later on that night at about 9.30pm on 12 December 2003, SP4 went to meet Sarawanan and another friend, Shanker Raj a/l Kamaraja, SP5 ('SP5') outside a motor shop in Pandamaran Jaya. Sarawanan had asked SP4 to meet him there. SP4 went by motorcycle and met both his friends there. At the time, the place was still busy with many persons in the area. While it was night and therefore dark, there was more than sufficient light from the row of shop houses in the vicinity. There were variously a 'tape' shop, a sundry goods shop, a tailor's and a fishmonger, all of which were still operational at that hour.

The three friends sat in the area immediately in front of the motor shop, on the pavement. SP4 sat on the right, SP5 on the left and Sarawanan in the middle. They knew the owner of the shop, one 'Mos'. They sat there for about half an hour.

[4] During this time, SP4 testified that he saw a white Proton Wira bearing registration number WDC 1115, circling the area three times. There was only one person in the car whom SP4 identified as being 'Agilan'. This vehicle circled the entire block of shop houses three times and then disappeared.

[5] Next, another vehicle, namely a Kancil, approached the area where they were sitting and stopped directly in front of them. It had approached from the direction opposite them. After it stopped, SP4 stated that he saw five or six persons emerge from the car. The driver did not get out of the vehicle. At least three or four of the persons who emerged were carrying large knives or '*parangs*'. SP4 confirmed that the '*parangs*'were large. Of these five or six persons, SP4 was only able to identify one person, namely the accused. He identified the accused from a distance of about three to four feet away from where he was sitting.

[6] This group of persons came directly towards the three friends, brandishing the knives or '*parangs*' that they held. Simultaneously, they

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

shouted foul words in the Tamil language. While this happened, SP4 also noted that there were other cars in the region, a Proton Satria and a Proton Saga. The Satria was driven up and down across the street, but SP4 could not identify the driver.

[7] As the group of men tried to attack SP4 and his friends, SP4 moved to avoid the blows from the knives and immediately ran away. In cross-examination, he confirmed that it took him about one second after seeing the men and the knives to get up and run. Sarawanan followed him in the same direction. As SP4 ran for his life towards the right of the shop houses, he turned back. He saw the accused together with two or three others slashing Sarawanan with a *parang*. SP4 testified that he saw the accused and the others slashing Sarawanan's foot with a *parang*. In his estimation, SP4 stated that he watched these persons slash Sarawanan for about three minutes and then he ran away as he was still being chased. In cross-examination, he stated that he watched for about one minute. At this point, he was about thirty feet away. He did not know the person who chased him bearing a large knife. SP4 managed to run into a small garden in front of the shops and evade his pursuer. He waited there for approximately twenty minutes before returning to the area of the shop houses to look for Sarawanan. He noted that there was blood in the area where he had witnessed Sarawanan being slashed. However, SP4 was unsuccessful in his attempts to locate Sarawanan. He was assisted by SP5 in his search for the deceased. SP5 had joined him after he came out of hiding in the garden. Then both the boys went to Sarawanan's elder brother's house to explain what had happened. They met with Sarawanan's uncle and informed him. SP4 went to the police station himself to assist with investigations.

[8] In the course of cross-examination, it was put to SP4 that the accused was not present at the scene of the incident and that he had not been involved. SP4 disagreed. From his testimony, it became apparent that he first identified the accused from a distance of three to four feet away within a time span of one second. He next saw the accused and some other men slashing at Sarawanan's leg from a distance of about thirty feet. SP4 could not be dissuaded that he had mistaken some other person for the accused. He maintained that the accused had emerged from the car on the right hand side and that he together with some others had slashed Sarawanan's leg.

[9] SP4 also explained that SP5 had run in the direction opposite to him and Sarawanan, namely to the left and that no one had pursued him. SP4 stated that he did not try to obtain any assistance during or after the incident, although some of the shops in the region were still operational. He did however ask the persons operating the motorshop in front of which they had been seated, whether they knew where Sarawanan was.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

The evidence of SP5, Shanker Raj a/l Kamaraja or Jack ('SP5')

[10] SP5 corroborated SP4's version of events that night. He confirmed that on 12 December 2003 at about 9.30pm, he had met SP4 and Sarawanan outside the motorshop in Pandamaran. Both of them were there when he arrived. He also confirmed that he saw the white Proton Satria bearing number plate WDC 1115 driven by Agilan circling the area three times. He mentioned this to his two friends. SP5 also confirmed that the three of them were seated on the pavement in front of the shop and that there were lights from the neighbouring shops. His version of events was that at about 10pm, he heard a sound of persons shouting. Upon hearing these shouts, he saw six or seven persons holding large knives or *parangs*. As soon as the three friends saw them, they ran away. He heard the shouts emanating from persons along the main road in front of the motorcycle shop. They were in a Kancil car. As the six or seven persons approached them, he noted the large knives. At that point, all he could focus on was his safety. He stated that he did not recognise any of the persons. As he got up to run, so did SP4 and Sarawanan. SP5 testified that one of the group chased him and he ran into a shop immediately next to the motor shop on the left. As soon as he went into the shop, which was an aquarium shop, the shopkeeper pulled down the shutters of the shop. SP5 was therefore safe. He stayed in the shop for fifteen to twenty minutes before emerging from it. The shopkeeper let him out. He then went back to the motor shop to look for his friends and eventually found SP4. He confirmed that they looked for, but could not find Sarawanan.

[11] SP5 further confirmed that he saw traces of blood in the area in front of the motor shop. Sarawanan's motorcycle was left parked in front of the shop.

[12] SP5 then went with SP4 to inform Sarawanan's uncle of the incident and his disappearance. He turned himself in to the police for questioning the following day.

[13] SP5's evidence remained consistent throughout his cross-examination. It did not emerge from his testimony that he knew the accused. In this context, it is relevant that SP5 was not part of the group involved in the earlier incident that day outside Dominic's house.

The evidence of the pathologist Dr Khairul Azman bin Ibrahim, SP11 ('SP11')

[14] SP11 explained that he conducted a post-mortem on the deceased, Sarawanan between 9.30am and 1.30pm on 15 December 2003. He found that the body was that of a young man partially burnt particularly involving the pelvic region, left part of the trunk, left arm and legs and minimally at

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

the forehead. He explained in detail about the burn marks indicating which parts of the body were more burnt than others. There were also no less than fifteen to sixteen slash wounds sustained by the victim over all parts of his body. He suffered:

(a) an incise wound measuring 3x2x1cm over the back of the right side of his chest with tail abrasion;

(b) a linear abrasion measuring 8cm over his right inguinal region;

(c) an elliptical incise wound on his right pelvic region measuring 2.5x1cm;

(d) superficial incise wound over front of his right shin measuring 2.5x1cm;

(e) slash wound over front of left ankle measuring 3.5x3.5cm directed downwards and inwards chipping the left tibia;

(f) slash wound over the tip of his left shoulder cutting the muscle and capsule and exposing the humerus bone measuring 10.5x5.5 to a depth of 4cm;

(g) a stab slash wound over the left side of his neck measuring 6x5cm to a depth of 4cm which cut the lateral one third of his cervical vertebra;

(h) two slash wounds over the left side of his head, one above the other; the lower slash was smaller 9x0.5cm and the upper slash wound was 14.5x3cm (the upper slash wound penetrated into the cranial cavity to a depth of 5cm; the lower slash wound did not penetrate the cavity but chipped the bone to a depth of 2cm);

(i) a slash wound over the right biceps region, measuring 7.7x3.5cm just cutting the muscle;

(j) slash wound over the lateral aspect of the cubital fossa extending distally to the extensor aspect of his right forearm measuring 14cm;

(k) slash wound over the back of his right writs, measuring 5x2cm, chipping the right ulnar and cutting the tendon to a depth of 2 cm;

(l) abrasion over the flexor aspect of the right forearm measuring 8x0.2cm;

(m) slash wound over the proximal part of the extensor aspect of the right forearm measuring 14x7cm;

(n) abrasion over the back of the right hand measuring 4x1.5cm;

(o) c-shaped slash wound over the lower part of the lateral aspect of right calf measuring 12x11cm directed inwards and upwards to a depth of 3.5cm just cutting the muscle;

(p) the skull was cut and fractured in the left temporal region extending to the left middle and posterior cranial fossa; and

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

(q) the skull showed a cut and fracture involving the left temporal, left middle and posterior cranial fossa. The distal end of the right tibia and fibula were cut, as was the right ulnar nerve transected. The pathologist concluded that the cause of death was slash wounds to the head, neck and right limb. The injuries he concluded were caused by sharp weapons. He further concluded that in view of the fact that there was no soot in the trachea or the smaller air ways that the victim had died prior to his body being burnt. If he had been burnt to death it was likely that he would have inhaled soot and this would have shown up in the airways.

[15] SP11 was unable to pinpoint any one injury as being 'fatal' as there were many serious slash wounds inflicted on the victim. He opined that the weapons used were sharp and heavy like '*parangs*' or axes. SP11 also confirmed that he took samples of blood, clothing, nail clippings and hair from the deceased.

[16] In the course of cross-examination, he was asked to estimate the time of death. He determined that as no maggots were present on the victim's body, the time of death was less than 24 hours from the time of receipt of the body, which was at 11.45am on 13 December 2003. He also stated that it was unlikely that the victim died instantaneously but that it probably took two hours for the blood loss to cause death.

The evidence of the investigating officer, Azhar bin Abu Bakar SP12 ('SP12')

[17] SP12 explained that on the morning of 12 December 2003 at about 9.30am he was called out to the region of Pam Air in Lipat Kajang, Klang where he saw the corpse of a male alongside the road in some bushes. The corpse was partially burnt on the left side of the body and was face downwards. His right hand was almost severed as was his right ankle. There were slash wounds on his abdomen.

[18] SP12 found blood stains on the road close to the bushes and trees. The water tank/reservoir was about 50 metres away. SP12 cordoned off the area, drew a sketch plan and instructed a photographer to take 19 photographs. He called upon the forensic team to assist him to investigate the area and to take blood samples from the area. He then took the corpse to the hospital for the conduct of the post-mortem. The victim was identified by his relatives at the hospital.

[19] The post-mortem was carried out in his presence and further photographs were taken. SP11 also took blood samples for various analyses to

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

be undertaken by the chemistry department. There were no conclusive results from the chemistry department in relation to these samples.

[20] SP12 was advised that SP4, SP5 and Dominic a/l Alagappan had been arrested and remanded. Based on the statements given by SP4, SP-12 carried out surveillance at house No 22, Jalan Hj Abdul Karim, Klang Jaya to arrest the accused, but he failed to procure the accused's arrest. Based on the statement given by Dominic, surveillance was carried out at Agilan's house to effect his arrest, but this also failed. Agilan however turned himself in on 14 December 2003 at 10.55pm.

[21] Subsequently, almost two years later on 6 October 2005 the accused was arrested.

[22] SP12 procured the entire version of events as set out by SP4 and SP5 above. He visited the site in front of the motor shop in Pandamaran and drew a sketch plan showing the entire lay-out of the shops as well as where the three friends were seated. The movements of the two cars was also indicated. Apart from this, SP12 interviewed the foreman of the motor shop in front of which the incident occurred as well as an employee of a music or CD shop which was located alongside the motor shop. He visited the area twice.

[23] SP12 also seized the white Proton Wira WDC 1115 that had been driven by Agilan, around the block three times, prior to the incident that night. An inspection of the inside of the car by the forensic experts showed that there were some blood stains on the cushion and also on the back of the car. However, on analysis by the chemist, these blood stains proved to be too weak and inconclusive to be of any use. Hence no conclusion could be drawn from these stains. As a consequence of his investigation, SP12 also confirmed that Agilan had driven around the block three times that night using this vehicle. Dominic was with him. However the vehicle did not belong to him but was used by him pending the repair of his car. Finally, SP12 was also appraised of the altercation that had taken place earlier that day between 2.30pm and 3.00pm outside Dominic's house.

[24] As a consequence of his investigation in 2003, and being unable to arrest the accused, SP12 placed the accused's name on a 'wanted' list and also issued a press release about him.

[25] In the course of cross-examination, SP12 conceded that he did not procure an explanation from Agilan as to the presence of the 'weak and inconclusive' blood stain found in the car he was using. It was suggested to him that in view of the blood stains in the vehicle, Agilan was a suspect but

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

SP-12 did not agree. He explained that he had sent those blood stains for analysis to ascertain whether they belonged to the deceased.

[26] SP12 also conceded that he did not take any blood samples from SP4 and SP5. He also explained that after the accused was arrested an identity parade was held and that SP4 had identified the accused. SP5 did not identify the accused. Finally, he explained that although he had tried to contact Agilan and Dominic, he could no longer find or reach them. It was put to him that his investigation was less than comprehensive, but the witness disagreed.

[27] The aforesaid comprises the material and salient portions of the evidence relating to the prosecution's case.

BURDEN OF PROOF AT THE CLOSE OF THE PROSECUTION'S CASE

[28] As prescribed by s 180 of the Criminal Procedure Code, the duty of the court at the close of the prosecution case is to consider whether a prima facie case has been made out against the accused. If a prima facie case has not been made out, the court is bound to record an order of acquittal, while if it has been made out on the offence charged, the court is bound to call upon the accused to enter on his defence.

[29] In order to ascertain whether a prima facie case has been made out, the evidence raised in the course of the prosecution case will have to be maximally evaluated. The duty of the court to undertake a meticulous examination of the evidence is independent of the issues raised by the defence, although the court is inevitably bound in the course of such examination to consider the numerous issues raised. The purpose of undertaking such an evaluation is to test the credibility of the prosecution's witnesses and to ensure that all the requisite ingredients of the offence have been made out. This in turn requires a thorough examination of the evidence as opposed to a mere cursory review, acceptance and reproduction of the evidence.

[30] The test to be adopted in determining whether a prima facie case has been made out has been clearly enunciated in, inter alia, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 and in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301.

INGREDIENTS OF THE OFFENCE OF MURDER UNDER S 302 OF THE PENAL CODE AND S 149 OF THE PENAL CODE

[31] Murder is defined in s 300 of the Penal Code ('the Code'). It

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

incorporates s 299 of the Code which defines 'culpable homicide'. Save for the five exceptions set out in the Code, culpable homicide is murder if it falls within one or more of the four limbs that have been prescribed in s 300 of the Code. It is punishable with death as provided for in s 302 of the Code.

[32] 'Culpable homicide' is defined as follows: 'Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'.

[33] The four limbs which characterise culpable homicide as murder in the Code are prescribed as follows:

> Firstly: ... if the act by which the death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

SECTION 149 OF THE PENAL CODE

[34] The section provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly is guilty of that offence. How is this section to be construed? In *Francis & Ors v Public Prosecutor* [1960] MLJ 40; [1959] 1 LNS 28, Thomson CJ had occasion to consider the application of this section:

> ... Section 149 provides that if an offence is committed by a member of an unlawful assembly then every member of the same assembly is guilty of that offence if either it is committed in prosecution of the common object of the assembly or it is such as the members of the assembly know to be likely to be committed in prosecution of the common object. Here the conditions are that there must be a common object, for without a common object there can be no assembly, and then either that common object must be to commit the offence which is in question or where the common object is not to commit it there must be knowledge that the offence is likely to be committed in prosecution of the common object.

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

[35] The relevant parts of s 141 of the Penal Code provide as follows:

> An assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is:
>
> (a) ...
>
> (b) ...
>
> (c) To commit any mischief or criminal trespass or other offence;
>
> (d) ...
>
> (e) ...

[36] In this context, the decision in *Ong chin Seng & Anor v Reg* [1960] MLJ 34 is relevant as it sets out the manner in which s 141 is to be construed:

> ... The commission of an offence by five or more persons whose common object was to cause hurt: by dangerous weapons would seem eminently to fall within the ambit of the chapter. It is, moreover, of interest, perhaps, to note the comment of Dr Gour in his book on the *Penal Law of India* at p 599 of the 6th Ed where he says: 'This clause is not free from avoidable ambiguity. It says that an assembly is unlawful, if its common object is to commit any mischief or criminal trespass, or other offence'. Now, strictly speaking, the other offence must be *ejusdem generis*; otherwise the preceding enumeration was unnecessary. But the clause is intended to include all offences both against person and property, and not only mischief, criminal trespass and *ejusdem generis*.

[37] Accordingly it follows that where the common object of the group of five or more persons is to commit an offence against a person or injury to a person, that group of persons becomes an unlawful assembly.

[38] And finally s 142 of the Penal Code provides that:

> Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of any unlawful assembly.

INGREDIENTS TO BE PROVED

[39] In the context of the present case, the ingredients that have to be proved are:

(i) that the accused was a member of an unlawful assembly;

(ii) an offence was committed by the accused as one of the members of the unlawful assembly in prosecution of the common object of that assembly;

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

(iii) the common object of the unlawful assembly was to cause grievous hurt to Sarawanan; or that

(iv) the members of the assembly knew that grievous hurt or possibly death was likely to be committed in pursuance of their common object, under s 149 of the Penal Code; and that

(v) Sarawanan is dead;

(vi) that his death was caused by, or in consequence of the acts of the members of the unlawful assembly, including the accused;

(vii) that such act was done:

(a) with the intention of causing death; or

(b) with the intention of causing such bodily injury as the accused or the assembly knew to be likely to cause death;

(c) with the intention of causing bodily injury which in the ordinary course of nature is sufficient to cause death; or

(d) with the knowledge that such act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and that such act was committed without any excuse for incurring the risk of causing death or such injury.

[40] It falls to be considered whether the evidence adduced during the course of the prosecution's case sufficed to prove the foregoing ingredients:

ingredient (i): that the accused was a member of an unlawful assembly;

ingredient (ii): an offence was committed by the accused as one of the members of the unlawful assembly in prosecution of the common object of that assembly; and

ingredient (iii): the common object of the unlawful assembly was to cause grievous hurt to Sarawanan.

[41] The evidence of SP4 and SP5 taken together shows that a group of five to seven men emerged from a silver Kancil car, shouting foul words in the Tamil language, while brandishing large sickle-like *parangs* or knives. They then proceeded to attack SP4, SP5 and the deceased. SP4 clearly identified the accused as a member of this assembly. From this evidence it can be seen that the accused was a member of an unlawful assembly, in that an assembly of five or more persons whose common object is to cause criminal mischief or trespass or any other offence is designated a member of an unlawful assembly.

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

[42] What was the common object of the assembly in this case? The fact that the common object of the unlawful assembly was to cause grievous hurt to, inter alia, Sarawanan is evident from the fact that three to four members of this assembly held large, sickle-like *parangs* in their hands and chased after the three friends, but proceeded to slash Sarawanan. This event was witnessed by SP4.

[43] It can be inferred from the acts of this group of men, armed with lethal weapons and brandishing the same, rushing towards and attacking an unarmed group of men who are merely sitting down, that they intended, or that their objective was to cause grievous bodily harm to one or more of those men. The fact that they chased all of them but slashed only Sarawanan goes to show that their common object was to cause grievous hurt to Sarawanan.

[44] As against this evidence, counsel for the defence contended that the evidence of SP4 should not be accorded undue weight, as he could not possibly have identified the accused in the short space of time before he ran away and that there was insufficient light for him to make such an identification. Additionally the fact that SP5 had not identified the accused although he was present and had been similarly chased threw doubt as to whether the accused was indeed present as part of that unlawful assembly.

[45] A perusal of the entirety of the evidence as outlined above will show that: (a) although SP4 stated that he only glimpsed the group of five or six men for a second as they emerged from their car, and came towards them brandishing their knives, he did get a second and better look after he had run some distance away. When he turned to look back, he saw from a distance of thirty metres or so that Sarawanan was being slashed by, inter alia, the accused on the tibia region of his leg. He witnessed this incident for a full minute before running again as he was chased. SP4 therefore did have sufficient time to make the identification. Moreover, SP4 had seen the accused earlier on that day at 2.30pm during the altercation in front of Dominic's house. SP4 was clear and consistent in his evidence that the accused was indeed one of the five or six men who had attacked Sarawanan and his credibility was not adversely affected during cross-examination; (b) as for lighting, although it was night, SP4 and SP5 both explained that there was sufficient lighting from the row of shop houses behind them as well as the street lamp to enable them to see clearly and to enable SP4 to make the identification. In fact SP4 and SP5 could even identify Agilan as the driver who drove the white Proton Satria car round the block three times prior to the incident. If they could identify Agilan from that distance, it is not improbable that SP4 was able to identify the accused when he attacked the three friends; (c) why didn't SP5 identify the accused? In this context it must be borne in mind that SP5 was not part of the group that was involved in the

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

altercation in front of Dominic's house that afternoon. As such he would not have met or seen the accused that afternoon. As such there was no reason for him to identify or pick out the accused, unlike SP4 who did witness the afternoon incident and who had in fact, slapped the accused. It was never put to SP5 in the course of cross-examination that he knew the accused. The only conclusion that can be drawn is that SP5 did not know the accused so as to identify him. It would be fallacious on the evidence on record to conclude that SP5 failed to identify the accused because he was not there. A further factor to consider is that SP5 ran in a direction opposite to SP4 and Sarawanan and took refuge in the shop next door to the motor shop. He was protected within the shop from the group and therefore did not see his attackers save for the brief second prior to his running away. For these reasons, I was unable to accept the defence contention that as SP5 did not identify the accused, while SP4 did, SP4's evidence was somehow flawed. It appeared to this court that while SP4 was able to make a clear identification as he had only recently met and had an altercation with the accused, SP5 had not. Neither was there evidence to suggest that SP5 knew the accused and therefore ought to have identified him. This was never put to SP5.

[46] As for ingredient (ii), namely that an offence was committed by the accused as one of the members of the unlawful assembly, in prosecution of the common object of that assembly, this is borne out by the evidence of SP4 when he testified that he saw the accused together with others slashing Sarawanan's leg in the region of his tibia. The offence committed there was the grievous hurt caused to Sarawanan by the accused being one of several others who were inflicting hurt on him. The three ingredients set out above are therefore fulfilled.

Ingredient (iv): the members of the assembly knew that grievous hurt or possibly death was likely to be committed in pursuance of their common object under s 149 of the Penal Code

[47] This ingredient can be inferred from the fact that a group of men armed with lethal weapons, namely the large *parangs* or knives must know that the consequence of their wielding these weapons is to cause serious bodily harm and injury to one or more persons, albeit singly or collectively, in the course of their pursuing their object of causing hurt to Sarawanan.

Ingredient (v): Sarawanan is dead

[48] The fact that Sarawanan is dead is proved by the evidence of Parameswaran a/l Thorman, the brother-in-law of the deceased as well as that of the pathologist, SP11.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

Ingredient (vi): that Sarawanan's death was caused by, or in consequence of the acts of the members of the unlawful assembly, including the accused

[49] From the testimony of SP4, there is direct evidence of a group of men slashing Sarawanan with *parangs*. There is clear evidence that his leg was virtually amputated from the slash wounds from the testimony of the pathologist, SP11.

[50] After this, SP4 who witnessed the slashing for a full minute then fled for his life. SP5 it will be recalled had fled in the opposite direction. There is no eye-witness testimony as to what happened to Sarawanan after this, save that he was found brutally slashed with seventeen or more deep slash wounds the following morning near the water reservoir at Lipat Kajang. His body too had been partially burnt as has been described earlier. Does it follow as contended by the defence that as there are no eye-witnesses, no further conclusions can be drawn about Sarawanan's death? That would, with respect, be an erroneous approach to adopt.

[51] That Sarawanan was last seen being slashed by members of the unlawful assembly including the accused with large *parangs*, coupled with the evidence of SP11, who described the cause of Sarawanan's death as slash wounds to his head and limbs by use of a sharp weapon, as well as the fact that he died prior to his body being burnt, warrant the inference that Sarawanan died as a consequence of being slashed with large sickle-like knives by several of the members of the unlawful assembly. Whether he died where he was first assaulted or subsequently near the water reservoir area is unclear. The pathologist estimated that it might have taken up to two hours before he died. But there appears little doubt, at this the prima facie stage of the case, that the members of the unlawful assembly including the accused were responsible for the attack on Sarawanan and his subsequent death. In short the cumulative effect of the evidence of SP4 considered in conjunction with that of SP11, and the fact that Sarawanan's body was found partially burnt near the water tank in Lipat Kajang gives rise to the irresistible inference and conclusion that the unlawful assembly of men wielding *parangs*, who had attacked SP4, SP5 and Sarawanan were responsible for his death arising from the multiple slash wounds to his person. There does not appear to be any other reasonable or possible explanation of these facts (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171).

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

The evidence of SP4

[52] It was urged upon the court to carefully scrutinise the evidence of SP4 in that:

(i) he could be mistaken given that it was night, he only saw the members of the assembly for a very short time, and given that SP5 had not identified the accused;

(ii) SP4's evidence was not corroborated; and

(iii) SP4's evidence was biased or tainted in that he harboured enmity against the accused in view of the events in the afternoon I have dealt with issue (i) earlier on in this judgment. As for SP4's evidence not being corroborated, I refer to the judgment of this court in *Public Prosecutor v Abdul Kadar Kadam Ali & Ors* [2008] 8 MLJ 349 in Criminal Case No 45–68 of 2003 where a similar point came up for consideration in that there was one primary witness on which the entire basis of the prosecution's case rested:

> ... In this context s 134 of the Evidence Act 1950 specifically provides that 'No particular number of witnesses shall in any case be required for the proof of any fact'. In *Aziz Muhamad Din v Public Prosecutor* [1997] 1 CLJ Supp 523 at p 540, Augustine Paul JC (as His Lordship then was) explained that:
>
> > the section enshrines the well recognized maxim that *evidence has to be weighed and not counted*. On the need for corroborative evidence for the proof of any fact, Sinha J said in *Vadivelu Thevar v State of Madras* [1957] SC 614 in the following terse terms at pp 618–619:

[53] On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:

(1) as a general rule, a court can and may act on the testimony of a single witness though uncorroborated; one credible witness outweighs the testimony of a number of other witnesses of indifferent character;

(2) unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character; and

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

(3) whether corroboration of the testimony of a single witness is oris not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

[54] The question that this court had to consider in the instant case was whether or not SP4's evidence was credible, given that he was the only witness who identified the accused. This issue was considered from two broad aspects, one to ascertain that the considerations in *R v Turnbull* [2001] EWCA Crim 2244 were applied, and secondly from the viewpoint that SP5 did not identify the accused. On the first aspect I was satisfied that SP4's evidence was credible. The quality of his evidence and thus its value was such as to formulate the core cord from which the other strands of circumstantial evidence could be bound and utilised, allowing a cumulative picture to emerge. He withstood credibly the onerous cross-examination through which he was put on the issue of the identity of the accused. The fact that he had seen and had an altercation with him earlier on that afternoon lent to the efficacy of his identification. I am also mindful of the rule in *R v Turnbull* which provides as follows:

> Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken.

[55] In this context, I have taken heed of the need to caution myself on this issue.

[56] On the second aspect of this issue, namely that SP5 did not identify the accused, I adopt the reasoning I laid out earlier. Essentially the fact that SP5 was not involved in the dispute earlier on in the day, means he did not see the accused earlier on in the day. There was no evidence on record to suggest that SP5 knew the accused. Neither was it put to SP5 that he knew the accused. It therefore follows that if SP5 did not know the accused then there would be no reason for him to 'identify' the accused out of the group of six or seven men who attacked the boys. For this reason I saw no reason at this stage of the case, to doubt SP4's clear and uncontroverted identification of the accused.

[57] Finally, I considered whether in view of the altercation that took place earlier in the afternoon whether SP4 was hostile to the accused and therefore sought to place blame on him. On this aspect there was insufficient evidence

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

available to warrant such an inference. For this court to so conclude would have been speculative, given the nature of SP4's testimony. His evidence was direct and devoid of emotion or blame. He described the events of the afternoon and night as they occurred. In this context it is relevant that the version of events he gave to the investigating officer after the incident remains identical to his testimony in court. It was on the basis of his statement that an attempt was made by the police to locate and arrest the accused, but they were unsuccessful in 2003. The accused was only arrested almost two years later, when an identification parade was held. SP4 identified him. Taken in toto, SP4's evidence was credible throughout.

Ingredient (vii): that such act was done

(a) with the intention of causing death; or

(b) with the intention of causing such bodily injury as the accused or the assembly knew to be likely to cause death;

(c) with the intention of causing bodily injury which in the ordinary course of nature is sufficient to cause death; or

(d) with the knowledge that such act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and that such act was committed without any excuse for incurring the risk of causing death or such injury.

[58] I was not satisfied on the totality of the evidence adduced in the course of the prosecution case that it was established that the accused or the members of the unlawful assembly intended to kill Sarawanan. It is true that numerous wounds were inflicted on him. However they were largely slash wounds on his limbs, not such as to cause instantaneous death. There was insufficient evidence from which the court could infer that the unlawful assembly of which the accused was a member, intended to cause death, or to cause such bodily injury as is sufficient to cause death. The pathologist, SP11 concluded that death would have occurred within about two hours of the injuries. The pathologist did not state in the course of his evidence that the bodily injury inflicted was sufficient in the ordinary course of nature to cause death. The court could not find the evidence of 'mens rea' or 'intention' as prescribed in the remaining three limbs of s 300 of the Penal Code. As all the ingredients necessary to prove a prima facie case against the accused were fulfilled, save for the final mens rea ingredient, I concluded at the close of the prosecution case that the charge be amended to one under s 304(a) of the Penal Code. Accordingly the charge against the accused was reduced to read as follows:

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

Bahawa kamu, bersama-sama beberapa orang yang masih bebas antara 12 Disember 2003, jam lebih kurang 9.30 malam hingga 13 Disember 2003 jam lebih kurang 8.00 pagi, di kawasan kedai Pandamaran Jaya dan/atau rumah pam air Lipat Kajang, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, adalah ahli yang menyalahi undang-undang di mana tujuan bersama kamu ialah untuk menyebabkan kecedraaan dengan menggunakan senjata merbahaya ke atas Sarawanan a/l Muniandy dan semasa kamu semua ahli perhimpunan tersebut, satu atau lebih satu daripada kamu dalam melaksanakan tujuan bersama kamu telah melakukan bunuh dengan menyebabkan kematian Sarawanan a/l Muniandy ia itu satu kesalahan di mana ahli-ahli perhimpunan mengetahui mungkin dilakukan dalam melaksanakan tujuan bersama perhimpunan tersebut dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 149 Kanun Keseksaan dan boleh di hukum di bawah seksyen 304(a) Kanun yang sama.

[59] The amended charge was read out to the accused who pleaded not guilty to the same. Accordingly defence was called.

THE DEFENCE CASE

[60] The accused opted to give evidence on oath after the three options available to him were explained by the court. He testified that in 2003 he worked as a photographer. On 12 December 2003 at about 2.30pm he explained that he was asked by his cousin Dominic to come to his house and Dominic needed to send his car to a workshop in Pandamaran Jaya as he had met with an accident. He therefore drove to Dominic's house and parked outside his house. Dominic was not in. The accused remained seated in his vehicle, talking to another cousin. At that time the accused saw four motorcycles with eight persons heading towards him. The motorcycles hit his right front side mirror and went past. The accused shouted 'Hoi', at which point the motorcycles ail turned back. SP4 then pulled the accused out of the car. SP4 then scolded the accused, saying This is my place. You don't talk too much. I am not happy with you and I know your house and I can find you. You wait.' Prior to that day, the accused had never seen or met SP4.

[61] Then, the accused said, SP4 slapped him. At this point, Dominic came towards the house with his mother. Dominic separated them and told SP4, 'Our problem is ours. Do not involve others who come to my house'. The accused saw the deceased there, but maintained that he had never seen Sarawanan either prior to that date and that he did not know him. Sarawanan did not say anything according to the accused, but merely stood there with his other friends. Dominic then told the accused to go back and that he would resolve matters with SP4. The accused then went to the workshop to repair his side-mirror.

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

[62] That evening at about 7pm, the accused testified that Dominic had come to his house to talk to him and apologise for the incident earlier that day, stating that he had problems with SP4 since his school days. The accused asked Dominic to pay for the cost of the damage to his side mirror and Dominic agreed to do so.

[63] Dominic then told the accused to meet him before he went to work, at a hairdresser's in Pandamaranjaya at 9pm that night to collect the money for the side mirror. The hairdresser's shop is located directly opposite the row of shop houses where SP4, SP5 and Sarawanan met that night.

[64] The accused stated that he went to the hairdresser's that night at the appointed time, but Dominic did not appear. He noticed that people were running to and fro in all directions, suggestive of a problem in the area. The accused then left the area.

[65] The accused was asked in the course of examination in chief whether SP5 was present at the incident on the afternoon of 12 December 2003, and he concurred that SP5 was indeed not present that afternoon. However the accused maintained that he knew SP5 as he had taken photographs of his family. This was never put to SP5 during the course of the prosecution's case.

[66] The accused maintained that the police did not arrest him between the date of the incident in 2003 and 2005 although he remained in Klang. This is in direct contradiction to SP12's evidence that they had indeed tried to locate and arrest the accused soon after the incident but had failed.

[67] In the course of cross-examination, the accused gave details pertaining to the incident on the afternoon of 12 December 2003. He maintained his version of events, namely that damage was caused by the motorcyclists and that SP4 pulled him out of the vehicle. He insisted that the motorcyclists had damaged his side mirror on purpose, not because the road was narrow. He also insisted that it was the right handle of a motorcycle that had damaged his side mirror.

[68] When it was put to the accused that SP4 did not in fact drag him out of the vehicle as he was riding a motorcycle, the accused maintained that SP4 was a pillion rider and got off his vehicle and dragged the accused out of the car. Then SP4 pulled at his shirt and used foul language on him. He denied any exchange of words between the deceased and himself. The accused agreed that he was angry with, and felt threatened by SP4 when he dragged him out of his vehicle and for damaging his side mirror. However the accused made no report to the police despite this.

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

[69] As for meeting Dominic that evening, the accused maintained that he agreed to do so because he needed the money to cover the cost of repair of his side mirror. However he went to explain that he did not wait for Dominic ultimately, because of the problems in the area. By problems in the area, he explained that he meant that people were running wildly in all directions. He felt scared and decided not to wait any longer. When pressed further he said he saw a number of persons running wildly carrying '*parangs*'. The accused was in his vehicle parked outside the hairdressing shop. He agreed that these people who were running around with *parangs* did not approach or disturb him. However, wanting to avoid a repeat of the earlier incident that afternoon, he left. He was unable to explain the nexus between the events of the afternoon and that night.

[70] He was asked again what the nexus was between the persons who were running and those he met that afternoon. He answered that as the people that night were carrying '*parangs*' he was scared and ran away, as did everyone in the area. He therefore did not meet Dominic that night. Notwithstanding this he maintained that he was desperate for the money and that was why he had gone to the shop that night to collect the money from Dominic. When it was put to him that despite being desperate, he had not waited for Dominic, he maintained that he was frightened by the atmosphere that evening and returned home. He never recovered the money from Dominic.

[71] When queried about sighting these persons brandishing '*parangs*', the accused maintained that the night was dark. He stated that he saw them when they ran in front of him. He was unable to state in which direction these persons went. He maintained that he left because he did not want to be attacked by these men who were carrying weapons. This group of persons came from the area in front of where he was parked. They arrived a few minutes past 9.15pm. They ran along the main road known as Jalan Pandamaran Jaya 99. They were not far from his car.

[72] The prosecution's version of events was then put to the accused. He strongly denied being involved in the attack on SP4, SP5 and Sarawanan.

[73] The defence sought to call Dominic as well as Agilan as witnesses but they were not available. As such the defence closed its case on 24 April 2009.

ANALYSIS OF THE DEFENCE CASE

[74] The accused's of events in relation to the events on the afternoon of 12 December 2003 concurred in terms of the occurrence of a dispute

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

involving the two sets of vehicles but differed materially in respect of the following matters:

(i) the accused maintained that the motorcycles had knocked onto his right hand side mirror, while SP4 stated that it was the accused who 'rammed' his car engine at the motorcyclists, causing them to turn back;

(ii) the accused stated that he was dragged out of the car by SP4 while SP4 maintained that the accused got out of the car;

(iii) the accused maintained that he remained silent, while SP4 stated that it was the accused who used foul language on them;

(iv) SP4 stated that he slapped the accused because of the foul language that he used, while the accused maintained that SP4 pulled him out of the car and slapped him; and

(v) SP4 described an exchange between the deceased and the accused, while the accused denied that any such exchange occurred.

[75] A comparison of the two versions shows that SP4 maintained that the dispute that afternoon arose as a consequence of the accused's behavior, while the accused maintained that it was SP4 primarily and his friends who had caused the problem. In the face of two contradictory versions, the court was constrained to rely on the law to make its conclusions. It was telling that at no stage during the course of the prosecution case, did the defence put to SP4 its contrasting version of the events of the afternoon of 12 December 2003. The items listed (i)–(v) above are materially different and distinct from the version put forward by SP4 yet he was never challenged directly or otherwise on these issues. The statement of law by Raja Azlan Shah CJ (as His Highness then was) is relevant here: ... A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* [1973] 1 NZLR 120, at p 122 where Haslam J said at p 122:

> In *Phipson on Evidence* (11th Ed para 1544) the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, vis, where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy or when counsel indicates that he is merely abstaining for convenience, eg to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

JOBNAME: No Job Name PAGE: 26 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

[76] Applying that principle in law to the current case, it follows that SP4's testimony does not fall within an exception to the general rule that a failure to cross-examine a witness on material particulars will amount to an acceptance of the witness's testimony. It appeared to the court that the accused's evidence in relation to the incident on 12 December 2003 appeared to be an afterthought, and customised to meet the version given by SP4.

[77] Turning to the events of the evening and night of 12 December 2003, the accused's version of events was that he was in the area at the time when a group of men were seen brandishing *parangs*, but at the same time, he maintained that he was seated in a vehicle far away from the incident and that he left upon seeing the group of men with their knives. On this occasion, the defence did put to the prosecution witness, SP4 that the accused was not a part of the unlawful assembly but did not specifically suggest that he was in fact waiting nearby in a vehicle.

[78] However, the accused's version of events that he waited outside the barber shop for Dominic but fled when he saw a group of men brandishing knives, did not seem credible. There appeared to be no reason for him to flee the area when the group of men was nowhere near the region of the car in which the accused said he was seated and as he maintained that there was no nexus between the events of the afternoon and the events of that night. Yet he saw fit to flee. This appeared to this court to be improbable.

[79] It further appeared improbable that after the incident in the afternoon, the accused was present in the vicinity of an attack involving the same persons involved in the afternoon incident, and yet claimed not to be involved. When this was contrasted with the clear and direct evidence of SP4 his evidence was far more credible. There was simply no thread of continuity or reason in the accused's version of events.

[80] When analysed, his version of events was a denial that he was a part of the unlawful assembly, yet he was present in the area on that night and saw an unlawful assembly on the same street. It would have been expected if indeed his version of events was bona fide, that this version of events would have been put to the prosecution witnesses from the outset. Taken as a whole, the lack of continuity and nexus in the accused's version of events, coupled with the failure to put the defence version of events to the prosecution witnesses, suggested that the defence had been tailored to meet the prosecution's version of events.

[81] This impression was fortified by the fact that during the defence case, the accused maintained that while he had never previously met either SP4 or Sarawanan, he knew SP5. Again this crucial fact was not put to SP5 at any

JOBNAME: No Job Name PAGE: 27 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

stage. However this piece of evidence had the effect of bolstering the defence position that SP4's identification of the accused was flawed because SP5 did not identify him as being a part of the unlawful assembly. This appeared to the court to be a clear attempt to throw doubt on SP4's clear identification of the accused.

[82] For the reasons set out above, I was not convinced by the accused's version of events which I considered to have been tailored to meet the prosecution case. Accordingly I rejected the defence. However matters did not end there. The defence contended that two material witnesses, Dominic and Agilan were not called. It is true that they were not called. The prosecution did in fact make attempts to locate them for purposes of the defence but failed to locate them. The issue that requires consideration is whether their absence in any way throws doubt on the case against the accused. In this context, Dominic's evidence would have been relevant to ascertain whether he did in fact instruct the accused to collect money from him near the shophouses in Pandamaran Java, where the attack took place that night. Agilan's evidence would have been relevant to consider the part he played in driving round the block of shop houses three times that night prior to the attack. Neither of these witnesses however would have been able to comment on whether or not the accused was a part of the unlawful assembly as they did not participate in the attack. This is clear from the evidence of both SP4 and SP5 who clearly identified Agilan prior to the attack but not during the attack by the six or seven men. Their absence does not therefore substantially affect the core of the case against the accused, namely that he was a part of an unlawful assembly that had as its common object, to cause grievous hurt to Sarawanan. It would also appear on a totality of the evidence that the cause or reason for this assembly of men brandishing knives and attacking the three friends, was the earlier incident that afternoon when the accused was insulted. In this context it is immaterial whether the fault in the afternoon lay with the accused or SP4 and Sarawanan. The relevant fact is the events of that afternoon afforded sufficient cause to the accused to formulate and implement an unlawful assembly that injured Sarawanan fatally.

[83] Finally, I considered whether there was any other reason that would cause me to conclude that the defence had thrown a reasonable doubt on the prosecution case. I could not find any other reason. Accordingly in all the circumstances of the case I am satisfied that the prosecution has proved its case beyond reasonable doubt in respect of the amended charge under s 304(a) of the Penal Code and therefore find the accused guilty of culpable homicide not amounting to murder under s 304(a) of the Penal Code. Having heard and deliberated on the plea of mitigation put forward by

JOBNAME: No Job Name PAGE: 28 SESS: 1 OUTPUT: Thu Oct 8 14:53:56 2009
/reports/caseml/case/mlj/2009_009_mlj_40

learned counsel for the accused, I sentenced him to a term of nine (9) years' imprisonment to take effect from the date of his arrest.

Accused sentensed to nine years' imprisonment.

Reported by Ashgar Ali Ali Mohammad